Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-695

AMERICAN PUBLIC GAS ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION (FORMERLY FEDERAL POWER COMMISSION), *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
PETITION FOR WRIT OF CERTIORARI	6
Opinions Below	7
Jurisdiction	9
Questions Presented	9
Statutes Involved	10
Propriety of Relief Requested	10
Statement of the Case	11
Reasons for Granting the Writ	14
Conclusion	31

TABLE OF CITATIONS

	Page
Alabama-Tennessee Natural Gas Co. v. *FPC*, 359 F.2d 318 (5th Cir., *cert. denied*, 385 U.S. 847 (1966)	21
Amerada Hess Corp., et al. v. *Fahy, et al.*, Supreme Court No. 76-649	8
American Public Gas Association, et al. v. *FPC*, 543 F.2d 356 (D.C. Cir. 1976)	8
American Public Gas Association, et al. v. *FPC*, 555 F.2d 852 (D.C. Cir. 1976)	8
American Public Gas Association v. *FPC*, 494 F.2d 925 (D.C. Cir.) *cert. denied sub nom., Southern California Gas Co.* v. *FPC*, 419 U.S. 882 (1974)	24
Austral Oil Co. v. *FPC*, 428 F.2d 407, *reh'g denied*, 444 F.2d 125 (5th Cir.), *cert. denied sub nom. Municipal Distributors Group* v. *FPC*, 400 U.S. 950 (1950)	21
American Smelting and Refining v. *FPC*, 494 F.2d 925 (D.C. Cir. 1974)	18, 24
City of Chicago v. *FPC*, 458 F.2d 731, *cert. denied*, 405 U.S. 1074 (1972)	21, 24
El Paso Natural Gas Co. v. *FPC*, 281 F.2d 587 (5th Cir. 1960), *cert. denied sub nom. California* v. *FPC*, 366 U.S. 912, *reh'g denied*, 366 U.S. 955 (1961)	21
FPC v. *United Gas Pipe Line Co.*, 396 U.S. 237 (1967)	9, 21
FPC v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968)	9, 22
MacDonald v. *FPC*, 505 F.2d 355 (D.C. Cir. 1974)	15
Mobil Oil Corp. v. *FPC*, 417 U.S. 283 (1974)	9, 14, 15, 24, 26
Mobil Oil Corp. v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973)	27, 28
Opinion No. 699, 51 F.P.C. 2212, *modified on other grounds*, Opinion No. 699-H, 52 F.P.C. 1604 (1974), *aff'd sub nom., Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941 (1976)	20, 22

TABLE OF CITATIONS—Continued

	Page
Opinion No. 770, 770-A, Docket No. RM 75-14, issued on July 27, November 5, 1976	8, 10, 12, 13, 20
Permian Basin Area Rate Cases, 390 U.S. 747 (1968), *affirming sub nom.*, 34 F.P.C. 159 (1966)	9, 14, 15, 21, 30
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954)	11
Public Service Commission of the State of New York v. *FPC*, 167 U.S.App. D.C. 100, 511 F.2d 338 (1975)	25
Shell Oil Co. v. *FPC*, 520 F.2d 1061 (5th Cir. 1975)	17, 22
Southern Louisiana Area Rate Proceeding, 40 F.P.C. 530 (1968), *aff'd sub nom., Austral Oil Co.* v. *FPC*, 428 F.2d 407, *rehg denied*, 444 F.2d 125 (5th Cir.), *cert. denied sub nom., Municipal Distributors Group* v. *FPC*, 400 U.S. 950 (1970)	21, 30
United States v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973)	29
The Second National Natural Gas Rate Cases, AFGA et al. v. *FPC, et al.*,	
Order of November 5, 1976	8
Order of November 9, 1976	8
Order of November 18, 1976	8
Opinion of June 16, 1977	6, 7
Order Denying Rehearing of August 17, 1977	6, 7
Order Denying Rehearing En Banc of August 17, 1977	7
Statutes and Regulations:	
Natural Gas Act	
Section 4(e), 15 U.S.C. § 717c(e)	7, 9, 10, 11, 25, 26
Section 19(b), 15 U.S.C. § 717r(b)	7, 9, 10, 11, 16, 25, 26, 27

TABLE OF CITATIONS—Continued

	Page
Title 28, United States Code,	
Section 1254	9
Section 2106	16
Department of Energy Reorganization Act,	
Public Law 95-91, 91 Stat. 565 (August 4, 1977)	8
Federal Power Act	
Section 205, 16 U.S.C. § 824d	11
Section 206, 16 U.S.C. § 824e	11
Administrative Procedure Act	
Section 553, 5 U.S.C. § 553	24, 26, 27, 28
Rules and Regulations:	
Federal Power Commission	
Section 1.20(g) (1)	26
Federal Rules of Appellate Procedure	
Rule 35	30, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ———

AMERICAN PUBLIC GAS ASSOCIATION
CONSUMER FEDERATION OF AMERICA,
NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS,
STATE OF MINNESOTA,
MINNESOTA PUBLIC SERVICE COMMISSION,
SENATOR HUBERT H. HUMPHREY,
PUBLIC SERVICE COMMISSION OF WISCONSIN,
UNITED STEELWORKERS OF AMERICA,
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION (NRECA),
AMERICAN PUBLIC POWER ASSOCIATION,
UNITED STATES CONFERENCE OF MAYORS,
NATIONAL FARMERS UNION,
NATIONAL FARMERS ORGANIZATION,
ENERGY ACTION COMMITTEE,
TOWARD UTILITY RATE NORMALIZATION (TURN),
INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
COUNTY OF ERIE, NEW YORK AND
CITY OF BUFFALO, NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
[FORMERLY FEDERAL POWER COMMISSION]

THE HONORABLE JAMES ABOUREZK,
ALABAMA GAS CORPORATION,
AMERADA HESS CORPORATION,
AMINOIL USA, INC.,
AMINOIL DEVELOPMENT, INC.,
AMOCO PRODUCTION COMPANY,
ASHLAND OIL INC.,
THE HONORABLE LES ASPIN,
ATLANTA GAS LIGHT COMPANY,
ATLANTIC RICHFIELD COMPANY,
AUSTRAL OIL COMPANY, INC.,
AZTEC OIL & GAS COMPANY,
H. W. BASS & SONS, INC.,
BALTIMORE GAS AND ELECTRIC CO.,
BAY STATE GAS CO.,
THE HONORABLE BERKLEY BEDELL,
BELCO PETROLEUM CORPORATION,
BERKSHIRE GAS CO.,
BOSTON GAS CO.,
BRISTOL AND WARREN GAS CO.,
THE HONORABLE WILLIAM BRODHEAD,
BROOKLYN UNION GAS CO.,
CABOT CORPORATION,
THE CALIFORNIA COMPANY,
CAPE CODE GAS CO.,
CENTRAL HUDSON GAS AND ELECTRIC CORP.,
CENTRAL ILLINOIS PUBLIC SERVICE CO.,
CHESAPEAKE UTILITIES CORP.,
CHEVRON OIL COMPANY,
CITIES SERVICE GAS COMPANY,
CITIES SERVICE OIL COMPANY,
CITIZENS GAS & COKE UTILITY,
CITY OF HOLYOKE, MASS. GAS & ELECTRIC DEPT.,
CITY OF WESTFIELD GAS AND ELECTRIC DEPT.,
CLARK OIL PRODUCING COMPANY,
COLUMBIA GAS SYSTEM,
COMMONWEALTH GAS CO.,

COMMONWEALTH OF PENNSYLVANIA,
CONCORD NATURAL GAS CO.,
CONNECTICUT GAS CO.,
CONNECTICUT NATURAL GAS CORP.,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
CONSOLIDATED NATURAL GAS SYSTEM,
CONSUMERS POWER COMPANY,
CONTINENTAL OIL COMPANY,
COQUINA OIL CORPORATION,
DAMSON OIL CORPORATION,
DAYTON POWER & LIGHT COMPANY,
DELMARVA POWER & LIGHT CO.,
DIAMOND SHAMROCK CORPORATION,
THE HONORABLE CHRISTOPHER DODD,
THE HONORABLE JOHN DURKIN,
ECEE, INC.,
ELIZABETHTOWN GAS CO.,
ENSEARCH, INC.,
EQUITABLE GAS COMPANY,
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FALL RIVER GAS CO.,
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FITCHBURG GAS & ELECTRIC CO.
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GAS SERVICE, INC.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
GETTY OIL CORPORATION,
GULF OIL CORPORATION,
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THE HONORABLE HERBERT HARRIS,
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ILLINOIS POWER COMPANY,
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INDIANA GAS COMPANY,
INEXCO OIL COMPANY,
KERR-MCGEE CORPORATION,
LACLEDE GAS COMPANY,
LONG ISLAND LIGHTING CO.,
LOUISIANA LAND AND EXPLORATION COMPANY,
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LOWELL GAS CO.,
LYNCHBURG GAS CO.,
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PINTO, INC.,
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PUBLIC SERVICE ELECTRIC AND GAS CO.,
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ROCHESTER GAS AND ELECTRIC CORP.,
THE RODMAN COMPANY,
THE HONORABLE JOHN SEIBERLING,
SHELL OIL COMPANY,
SIGNAL PETROLEUM COMPANY,
SKELLY OIL COMPANY,
SOHIO PETROLEUM COMPANY,
SOUTH COUNTY GAS CO.,
SOUTH JERSEY GAS COMPANY,
SOUTHERN CALIFORNIA GAS COMPANY,
SOUTHERN CONNECTICUT GAS CO.,
SOUTHERN UNION PRODUCTION COMPANY,
STATEX PETROLEUM, INC.,
THE HONORABLE GERRY STUDDS,
SUN OIL COMPANY (DELAWARE),
THE SUPERIOR OIL COMPANY,
TENNECO OIL COMPANY,
TENNESSEE GAS PIPELINE COMPANY, INC.,
TESARO PETROLEUM CORPORATION,
TEXACO, INC.,
TEXAS GULF, INC.,
TEXAS PACIFIC OIL COMPANY, INC.,
TEXAS PRODUCTION COMPANY,

TIVERTON GAS CO.,
TRANSOCEAN OIL, INC.,
UGI CORPORATION,
UNION OIL COMPANY OF CALIFORNIA,
VALLEY GAS CO.,
WASHINGTON GAS LIGHT CO.,
WISCONSIN GAS COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Rule 21 of the Rules of the Supreme Court of the United States, the American Public Gas Association, Consumer Federation of America, New Jersey Board of Public Utility Commissioners, State of Minnesota, Minnesota Public Service Commission, Senator Hubert H. Humphrey, Public Service Commission of Wisconsin, United Steelworkers of America, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), International Association of Machinists & Aerospace Workers, National Rural Electric Cooperative Association (NRECA), American Public Power Association, United States Conference of Mayors, National Farmers Union, National Farmers Organization, Energy Action Committee, Toward Utility Rate Normalization (TURN), Industrial Union Department, AFL-CIO, County of Erie, New York, and City of Buffalo, New York, joint petitioners before the United States Court of Appeals for the District of Columbia Circuit and joint petitioners before this Honorable Court, hereby request that a writ of certiorari issue to review opinions and orders entered by the United States Court of Appeals for the District of Columbia Circuit on June 16 and August 17, 1977 in *The Second National Natural Gas Rate Cases, American Public Gas Association, et al.* v. *Federal Power Commission*, Nos. 76-2000 *et al.* These opinions and orders are unpublished and are reproduced as Appendices A, B and C accompanying this Petition. By those opinions and orders, which conflict with the decisions of this Court and other Circuits as well as the mandates of the Natural Gas Act, Petitioners have been deprived of any opportunity to cross-examine the complex and contested presentations of, *inter alia*, tax models and American Gas Association reserve data which form the bedrock for the Commission and the court of appeals' decisions; have been deprived of the protections provided by the substantial evidence rule mandated by Section 19(b) of the Natural Gas Act; have been deprived of the benefits of the "actual taxes paid" rule established by this Court; and have been forced to bear, as consumers, the statutory burden of proof placed upon producers by Section 4(e) of the Natural Gas Act.

OPINIONS BELOW

The principal opinions of the court of appeals are separately provided as Appendices A, B and C hereto. Appendix A is the opinion of the court of appeals entered on June 16, 1977 (Senior Circuit Judge Fahy dissenting in part). Appendix B is the Order entered for the court on August 17, 1977 by Circuit Judge Leventhal and by District Judge Gesell, denying petitions for rehearing (Senior Circuit Judge Fahy dissenting in part). Appendix C is the Order entered by the court of appeals on August 17, 1977 denying request for rehearing *en banc* on the basis that a majority of circuit judges in active service recused themselves from consideration of the case.

Other Orders of the court of appeals which are related to this case but which are not the subject of this Petition are the Orders of November 9 and 18 and December 13, 1976, relating to the proper venue for *The Second Na-*

tional Natural Gas Rate Cases appeals. These Orders are reported as *American Public Gas Association* v. *Federal Power Commission*, 555 F.2d 852 (D.C. Cir. 1976).

Other Orders of the court of appeals relevant to this matter deal with that court's action taken on August 9 and November 9, 1976, as amended November 18, 1976, under the All Writs Act, 28 U.S.C. § 165 (1970), which provided for contingent refunds pending disposition on rehearing of Federal Power Commission (FPC or Commission) Opinion No. 770.[1] The Order of August 9, 1976, is reported in *American Public Gas Association* v. *FPC*, 543 F.2d 356 (D.C. Cir. 1976). The Order of November 9, as amended on November 18, 1976 is set forth as Appendices D and E of the separate volume hereto. These Orders of the court of appeals relating to refund liability were the subject of a petition for certiorari. *Amerada Hess Corp. et al.* v. *Fahy, et al., and American Public Gas Association*, —— L.Ed 2d —— No. 76-649 (January 25, 1977). Upon motion of the petitioning producers therein, the petition was dismissed.

Opinion No. 770 (issued July 27, 1976) and Opinion No. 770-A (issued November 5, 1976), the principal decisions of the Federal Power Commission in the proceeding designated Docket No. RM75-14, *National Rates for Jurisdictional Sales of Natural Gas*, and all other relevant FPC Orders connected with that proceeding, are set forth in Part I, Volumes 1 and 2, of the Joint Appendix in the court of appeals proceeding. Those volumes accompany this Petition. Cites to those volumes will be J.A. ——.

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[1] The FPC was abolished effective October 1, 1977, and its functions transferred to the new Federal Energy Regulatory Commission (FERC), pursuant to the Department of Energy Organization Act. Public Law 95-91, 91 Stat. 565 (Aug. 4, 1977).

JURISDICTION

The Opinions and Orders of the court of appeals which are the subject of the instant petition were entered on June 17 and August 17, 1977, and are set forth separately in an appendix. Jurisdiction of this Court is invoked pursuant to Section 1254 of the Judicial Code, 28 U.S.C. § 1254, and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Did the court of appeals err in abandoning the "substantial evidence" standard of judicial review mandated by Section 19(b) of the Natural Gas Act and by this Court in, for example, *Permian Basin Area Rate Cases* and *Mobil Oil Corp.* v. *FPC*, and in substituting a hybrid (and lesser) standard of its own manufacture?

2. Did the court of appeals err in disregarding the "actual taxes paid" doctrine and the reducing impact of consolidated tax returns standard set forth by this court in *United I* and *United II*, in approving a hypothetical income tax model developed with an acknowledged disregard for producer compliance with Section 19(b)'s requirement of production of substantial evidence of what taxes, if any, are anticipated and Section 4(e)'s placement of the burden of such proof on the producers, thus producing a model in conflict with the standards set by this Court in *Permian Basin Area Rate Cases*?

3. Did the court of appeals err in approving the use of informal rulemaking procedures in setting the largest multi-billion dollar rate increase in the nation's history when the very nature of, and the factual and legal complexity and evidential requirements underlying this national rate proceeding compel the conclusion that the informal rulemaking procedures utilized by the Commis-

sion did not meet the statutory standard of "full hearings" resulting in "substantial evidence" which supports "just and reasonable rates" guaranteed by Sections 4(e) and 19(b) of the Natural Gas Act, nor the fundamental fairness requirement of constitutional due process, nor the standards of the Commission's own rules of practice and procedure?

STATUTES INVOLVED

The statutes involved are Sections 4(e) and 19(b) of the Natural Gas Act, 15 U.S.C. § 717c(e) and 717r(b). Copies of these provisions are found at Appendices F and G in the separately provided appendix.

PROPRIETY OF THE RELIEF REQUESTED

The court of appeals characterizes the instant proceeding as a major case.[2] Orders 770 and 770-A represent the largest rate increase affecting consumers ever granted in the history of the United States. They set dramatically increased rates for natural gas on a nationwide basis, almost *tripling* the price of new natural gas, costing interstate consumers of natural gas an additional $1.49 *billion* during the first twelve months of their effectiveness according to the FPC's own estimates.[3] In affirming, the court of appeals (with Judge Fahy dissenting on certain important issues) overturned prior law established by this Court and in conflict with other circuits on such issues as the proper standard for judicial review, the treatment of Federal income taxes in FPC-approved rates, the approval of new rates based on admittedly inadequate evidence from the industry on gas reserves, and the procedures to be followed by the Commission, including the proper imposition of the burden of proof, in proceedings

[2] Appendix A at 16.

[3] Appendix A at 11, 16.

to establish "just and reasonable" rates under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and d. As such, the court of appeals' opinion will also have far-reaching, precedential impact upon the natural-gas pipeline and electric utility proceedings before the FERC.[4] The importance of this case in terms of dollar impact and precedential value cannot be overstated.

STATEMENT OF THE CASE

On December 4, 1974, the Commission instituted an informal rulemaking proceeding, docketed as No. RM75-14, to set national rates for post-December 31, 1972 new and flowing gas.[5] The Commission did not order that any hearing be held or that any other evidentiary procedures be permitted. Instead, it spent over 19½ months to collect and presumably review the informal comments by interested parties before issuing Opinion No. 770 on July 27, 1976. Petitioner APGA filed five different sets of informal comments on various issues but was not permitted to question under oath, either orally or in writing, any of those responsible for the various comments, recommendations and submissions of the producers and the FPC Staff, even though APGA requested a hearing in three different sets of comments.

Then, with only a series of unrelated comments before it and no evidence in the record, the Commission issued

[4] Since the United States Supreme Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), held that the producers of natural gas are "natural-gas companies" as equally subject to FPC jurisdiction as pipeline companies, conclusions of this Court concerning the meaning of the various sections of the Natural Gas Act in cases involving producers are equally applicable to pipeline proceedings. Moreover, since the language of Sections 4 and 5 of the Natural Gas Act is virtually identical to that of Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and e, the Court's conclusions will apply to electric utility proceedings as well.

[5] *See* "Order Instituting National Rate Proceedings," J.A. 1-19.

Opinion No. 770 in which it, *inter alia*, almost tripled the rate for "new" gas from 52¢ per Mcf to a base rate of $1.42 per Mcf. Since the Opinion No. 770 rates were made immediately effective and since the Commission did not include any provision for refunds for the portion of the rates found unlawful on rehearing or on review by the court of appeals and/or by the United States Supreme Court and since the impact of these rate increases on interstate consumers was devastating, Petitioners immediately filed a Motion for a Stay with the Commission in Docket No. RM75-14 and a Petition for Emergency Stay with the court of appeals, docketed as CADC No. 76-1694, on July 28, 1976, to stop the Opinion No. 770 rates from becoming effective. After the Commission issued its Order Denying Stay [6] on August 2, 1976, the court of appeals issued its Orders of August 9 and September 2, granting a partial stay and mandatory refund requirement pending the Commission's final decision on rehearing. *APGA* v. *FPC*, 543 F.2d 356 (D.C. Cir. 1976).

Applications for rehearing of Opinion No. 770 were filed by numerous parties, including Petitioners. The Commission subsequently issued an Order Requiring New Producer Filings [7] on October 21, 1976, in which it attempted to tighten to some extent the eligibility requirements for recompletions to qualify for the Opinion No. 770 rates. This order was closely followed by the issuance of Opinion No. 770-A,[8] the Commission's final order on rehearing, on November 5, 1976.

On that same day, Petitioners sought review of Opinion Nos. 770 [9] and 770-A [10] from the court of appeals, and

[6] J.A. 535-543.

[7] J.A. 575-580.

[8] J.A. 581-880.

[9] J.A. 297-530.

[10] J.A. 581-880

on November 8 requested an extension of the emergency relief granted by that court in its August 9 and September 2 Orders pending the completion of judicial review since the Commission specifically refused to include a mandatory refund provision in Opinion No. 770-A. This extension was granted by the court of appeals' Orders of November 9 and November 18, 1976.[11]

On December 6, 1976, the court of appeals set an expedited briefing schedule and on December 30, 1976, determined that it would exercise its jurisdiction and venue to review Opinion Nos. 770 and 770-A.

The court of appeals in its June 16, 1977 panel decision (from which Senior Circuit Judge Fahy dissented on several important issues pertaining to income taxes, burden of proof, substantial evidence and the standard for judicial review) affirmed in their entirety the rates set for interstate sales of natural gas by producers in FPC Opinion Nos. 770 and 770-A, resulting in an increased cost to the interstate consumers of natural gas of approximately $1.49 *billion* to $1.78 *billion* during the first twelve months that these rates were in effect according to the FPC's own estimates.[12] The lower court reached this result by adopting conclusions of law contrary to those established by this Court and in conflict with other Circuits, on such important issues of broad precedential importance as: (1) the proper standard for judicial review; (2) the treatment of Federal income taxes in FPC-approved rates, specifically the inclusion of a hypothetical 43.05¢ per Mcf Federal income tax component in the new rate, the integrity of which was not required to be established by the Producers either before the Commission or the court of appeals; (3) the approval of new rates based on the use of untested, unverified, self-serving and admittedly inade-

[11] Appendices D and E.

[12] Appendix A at 11, 16.

quate evidence from the industry on gas reserves, in the computation of the critical productivity figure; and (4) the procedures to be followed by the Commission, including the proper imposition of the burden of proof in proceedings to establish "just and reasonable" rates under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and d.

On August 17, 1977, the panel, Judge Fahy dissenting on several issues, denied Petitioners' application for rehearing.[13] Also on the same day, Petitioners' suggestions for rehearing *en banc* were denied because "a majority of the circuit judges in active service . . . recused themselves." [14]

REASONS FOR GRANTING THE WRIT

1. The court of appeals' opinion approving rates for all interstate new gas, all post-December 31, 1972 flowing gas, and even some pre-1973 flowing gas which will cost interstate consumers more than one and one half billion dollars per year in increased rates, rests upon a novel standard of judicial review which abandons the "substantial evidence" standard mandated by Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and is at odds with the Supreme Court's decisions in, for example, *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968) and *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 308 (1974).

It is clear from the court of appeals' opinion that "substantial evidence" as required by Section 19(b) of the Natural Gas Act does not exist to support any of the Commission's conclusions on the major issues, such as taxes, productivity, and the rate treatment of rollover

[13] Appendix B at 130-136.

[14] Appendix C at 137.

contracts. Since the court of appeals reached the conclusion at the outset of its opinion "to affirm an order regardless of misgivings, but to discharge the function of identifying problem areas that call for reconsideration and that cannot be affirmed in subsequent proceedings in the absence of reasoned support grounded in experience," [15] it was necessary for the panel to abandon the substantial evidence standard of review prescribed in the Act and to utilize instead a much less stringent, and hence unlawful, standard of review. As the appeals court recognized, "[t]he standard of judicial review substantially determines, in cases like this, the outcome of the court." [16]

This new lax standard of judicial review deprives consumers of billions of dollars of their earnings contrary to the mandate of Congress as confirmed by the holding of this Court in *Permian* that the court of appeals "must decide whether each of the order's essential elements is supported by substantial evidence." [17] In particular, the new test pays no heed to this Court's recent plain language in *Mobil* that

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals.[18]

And the court of appeals' new lax standard is in conflict with the standard it recognized as controlling in *MacDonald* v. *FPC*, 505 F.2d 355 (D.C. Cir. 1974):

> The Supreme Court in *Mobil Oil* made clear that Courts of Appeals rather than itself have the major responsibility in applying these standards of review,

[15] Appendix A at 24.

[16] *Id.* at 92.

[17] 390 U.S. at 791-92.

[18] 417 U.S. at 310.

especially that of determining whether substantial evidence supports each of the Commission's findings.[19]

Instead, the appeals court informs us on at least three separate occasions that rather than sitting as a court of law pursuant to Section 19(b) of the Natural Gas Act, the panel was sitting as a court of equity pursuant to 28 U.S.C. § 2106:

> It is our judgment that our review as a court of equity, concerned with the overall interest of justice, 28 U.S.C. § 2106, is best fulfilled by affirmance of the ruling under review [on productivity and the use of admittedly unverified and untested industry reserve data] at this juncture.[20]
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> * * * *
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> . . . we discharge our obligation to further the interest of justice, 28 U.S.C. § 2106, without insistence on a more extended and plenary analysis of predictions [as to the rate treatment for gas subject to rollover contracts].[21]
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> * * * *
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> Overall we conclude that this is an approach that carries out our judicial obligation to render judgment in the interest of justice, see 28 U.S.C. [§] 2106.[22]

However, the appeals court cites no authority for the proposition that a court of appeals' jurisdiction to review FPC opinions is derived from 28 U.S.C. § 2106 rather than the substantial evidence mandate of § 19(b) of the Natural Gas Act.[23] Furthermore, Section 2106

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[19] 505 F.2d at 363 (emphasis supplied).

[20] Appendix A at 62.

[21] *Id.* at 84.

[22] *Id.* at 93.

[23] In fact, 28 U.S.C. § 2106 specifically states that it applies solely to review of a "judgment, decree, or order of a *court*," not an administrative agency. The statute reads as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

makes no mention of a vague "interest of justice" equitable review standard, or any other review standard. The reference to "as may be just under the circumstances" applies solely to ordering further proceedings on remand, and no standard for judging the propriety of an affirmance is contained in the statute.

While a somewhat more flexible view of substantial evidence was taken by this Court in *Permian* almost a decade ago because it was the first area rate proceeding, this Court warned that "we must, however, emphasize that this weight [given to the unusual difficulties of the first area rate proceeding] must significantly lessen as the Commission's experience with area rate regulation lengthens."[24] And in the first national rate case, the Fifth Circuit bluntly declared in *Shell Oil Co.* v. *FPC*[25] that it was affirming the Commission under a "kid glove" review standard with the understanding that that was the last time the Commission would be permitted to hide behind the excuse of the allegedly experimental nature of area ratemaking in order to avoid a strict application of the substantial evidence review standard:

> We must express our regret, however, that the FPC continues to issue orders which would be inadequate but for our "kid glove" treatment . . . For over fourteen years the Commission has been experimenting in area rate regulation and yet it still "supports" many of the essential elements of its new national rate order with little more than *ipse dixit.*

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[24] 390 U.S. at 792.

[25] 520 F.2d 1061 (5th Cir. 1975).

> But a cautionary note should indicate that as experiment lapses into experience, the courts may well expect the Commission to justify its policies with reasoned projections of that once-prototypic policy's probable net effect. The principle of *stare decisis* may only lightly touch the standard of subsequent review.[26]

However, the court of appeals' opinion in this second national rate case continues and even relaxes further this "kid glove" standard by again seeking to justify the affirmance of the critical conclusions of the Commission, which are unsupported by substantial evidence, on the ground of experiment and then adds the half-hearted admonition that *next time* the appeals court will require the Commission's actions to be supported by substantial evidence as required by Section 19(b) of the Natural Gas Act.[27] For example, on the issue of productivity and the Commission's exclusive reliance on American Gas Association ("AGA") reserves data, the appeals panel begins by admitting that "[t]he FPC's

[26] 520 F.2d at 1072.

[27] The appeals court also attempts to rationalize the inadequacy of the evidentiary procedures followed by the Commission in a proceeding under Sections 4 and 5 of the Act and the panel's eschewing of the substantial evidence review standard embodied in Section 19(b) of the Act on the grounds of a national supply "emergency." See Appendix A at 92, 61. However, the same appeals court made clear in *American Smelting and Refining* v. *FPC*, 494 F.2d 925 (D.C. Cir. 1974), that the alleged existence of an emergency, even if true, does not in any way negate the requirement in a Section 4 or 5 proceeding for holding the evidentiary hearings necessary to obtain the substantial evidence mandated by Sections 4, 5 and 19(b) of the Natural Gas Act:

> "Like any order issued pursuant to section 5(a), *an interim order can only issue after full hearing* and must include a statement of reasons based upon findings of fact which are *supported by substantial evidence in the record. No emergency can excuse these procedural requirements.*" [494 F.2d at 933 (emphasis supplied).]

support for its approach is thin."[28] It then states that "[t]he Commission concedes that it does not even know some of the assumptions on which the AGA estimates are based,"[29] and confides that "[w]e are reluctant to approve that AGA data series, for we recognize the problems created by the Commission's reliance on essentially unverified industry data."[30] But because of the court of appeals' refusal to require substantial evidence, it concludes that "[w]e do not approve or embrace the AGA figures; we simply tolerate them for purposes of this proceeding,"[31] and it further informs us that this conclusion is reached "with more of a sigh than a whoop."[32] However, while the appeals panel states that "we do not approve or embrace the AGA figures, its approval of the new rates based in large part upon this underpinning in fact does approve the AGA data and incorrectly shifts the Natural Gas Act's burden of proof requirement from producers to consumers. If the AGA data does not rise to the level of substantial evidence, as the court of appeals clearly indicates it does not, the companies which have refused to produce the verified actual records of their reserves should not, indeed may not, be rewarded with increased rates at the expense of the nation's consumers.[33]

[28] Appendix A at 50.

[29] *Id.* at 53 (footnote omitted).

[30] *Id.* at 55.

[31] *Id.* at 62.

[32] *Id.* at 50.

[33] *Id.* Judge Fahy noted his discomfort with the conclusion on productivity and AGA reserves reached by Judge Leventhal in the former's section of the panel's opinion concerning the informal rulemaking procedures followed by the FPC. He recognized that the Commission's procedures did not include "some method of testing [the AGA reserves data's] reliability and adequacy" and lamented that the producers' presentation of the AGA data had not "withstood a more searching inquiry than was permitted under the procedures which were followed." *Id.* at 101. Perhaps the reasons and the

2. The arbitrary affirmance of the inclusion of a 43.05¢ per Mcf hypothetical Federal income tax component in the "new" gas rate, which accounts for almost half of the 90¢ per Mcf increase in the new gas base rate (from 52¢ per Mcf set in Opinion No. 699-H to $1.42 per Mcf granted in Opinion No. 770-A), marks the first time that *any* income tax component has been included in producer rates by the Commission and approved by a court of appeals. The court of appeals cites no evidence in the record that this amount, or any portion of it, will actually be paid in taxes and instead relies solely on a hypothetical model.[34] As Judge Fahy shows in his well-

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antidote for his concern were best expressed by the Honorable Joseph Zwerdling, Chief Administrative Law Judge of the FPC, who has presided over proceedings at the FPC for more than 20 years:

> "I just want to take a brief moment here to express my views about the importance of developing and testing the position of the expert witnesses in open hearing.
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> * * * *
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> "In my judgment the handling of expert witnesses on the basis solely of written presentations does not produce the most useful and reliable record for the decision-maker. The decision-maker will be in a far better posture if the competing positions of the experts are developed and tested in open hearing, in the crucible of cross-examination and rebuttal.
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> "If, by contrast, the expert's views are presented only in written materials, there is a danger that we will be getting not just the expert's own unadulterated story, but a flavor resulting from counsel's input. There is a substantial value in confrontation through cross-examination, where the expert witness' answers must be entirely his own, as distinguished from successive rounds of written interrogatories, where counsel for the sponsoring party will have a relaxed opportunity to make a cautionary and therapeutic input." [Panel III: Decision-making in Agency Proceedings, Administrative Law Review, Fall 1974, Volume 26, No. 4, p. 496.]

[34] The unreasonableness of the FPC's approach, i.e., its inclusion of a large tax component absent any tax returns or like evidence demonstrating that an income tax allowance is proper, was recently, albeit tacitly, recognized by the FERC in an order issued October 28, 1977, in *Southern California Edison Co.*, where it stated as follows:

reasoned dissent on this tax issue,[35] the result of the appeal panel's decision, is *inter alia*, (1) to unlawfully shift the burden or proof from the producers to the consumers by overruling all prior decisions, such as this Court's *Permian Basin Area Rate Cases*,[36] the Fifth Circuit's opinion in *Southern Louisiana Area Rate Proceeding*,[37] and the FPC's own Opinion No. 699,[38] all of which unanimously held that until the producers proved through the presentation of their tax returns and back-up workpapers that they paid taxes, no tax component would be included in the rate; (2) to improperly disregard the Supreme Court's "actual taxes paid" doctrine set forth in *Federal Power Commission* v. *United Gas Pipe Line Co. (United I)*,[39] followed by the appeals court in *City of Chicago* v. *FPC*,[40] and espoused by the Fifth Circuit in *Alabama-Tennessee Natural Gas Co.* v. *FPC*,[41] and *El Paso Natural Gas Co.* v. *FPC*;[42] and (3) to arbitrarily

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> "It would appear self-evident that income tax returns are the best evidence of the reasonableness of any utility's claimed income tax allowance in rate cases." (Mimeo. at 4 n.5.)

[35] Appendix A at 114-125.

[36] 34 F.P.C. 159, 206-07 (1956), *aff'd sub nom.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[37] 40 F.P.C. 530, 585-86 (1968), *aff'd sub nom.*, Austral Oil Co. v. FPC, 428 F.2d 407, *reh'g denied*, 444 F.2d 125 (5th Cir.) *cert. denied sub nom.*, Municipal Distributors Group v. FPC, 400 U.S. 950 (1970).

[38] 41 F.P.C. 2212, 2259-61, *modified on other groups*, Opinion No. 699-H, 52 F.P.C. 1604 (1964), *aff'd sub nom.*, Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1975), *cert. denied sub nom.*, California Co. v. FPC, 426 U.S. 941 (1976).

[39] 396 U.S. 237, 244-45 (1967).

[40] 458 F.2d 731, 756, *cert. denied*, 405 U.S. 1974 (1972).

[41] 359 F.2d 318, 327-28 (5th Cir.) *cert. denied*, 385 U.S. 847 (1966).

[42] 281 F.2d 567, 572-73 (5th Cir. 1960, *cert. denied sub nom.*, California v. FPC, 366 U.S. 912 *reh'g denied*, 366 U.S. 955 (1961).

ignore the reducing impact of the use of consolidated tax returns on the actual taxes paid by producers, contrary to the Supreme Court's *United I* decision [43] and its follow-up opinion in *Federal Power Commission* v. *United Gas Pipe Line Co. (United II)*."[44]

As a preface to his forceful dissent to the inclusion of 43.05¢ per Mcf in the new gas rate and of the similarly calculated component in the 1973-1974 vintage rate as allowances for Federal income taxes on the ground of lack of substantial, or even any, evidence in the record, Judge Fahy voices his concern and uneasiness about the use of the lax standard of review in Judge Leventhal's opinion:

> . . . I do have a reservation respecting its treatment of the scope of review, thought to be required by the Supreme Court, particularly as it may seem unduly to relax our reviewing responsibility with respect to the standard which requires that essential factual elements of a Commission order be supported by substantial evidence."[45]

He then proceeds to demonstrate the lack of substantial evidence to support Judge Leventhal's treatment of Federal income taxes.

Judge Fahy notes first that in Opinion Nos. 699 and 699-H, the Commission held and the Fifth Circuit affirmed in *Shell*, *supra*, that without the producers' tax returns and back-up data, "there was no evidence of taxes paid" and "estimates would have involved unfounded speculation" and, therefore, no income tax component was included in the rate.[46] While the tax laws may have

[43] 386 U.S. at 244-47.

[44] 393 U.S. 71, 72 (1968) (per curiam).

[45] Appendix A at 114 (Judge Fahy dissenting).

[46] *Id.* at 115.

changed, making the possibility that some taxes will now be paid by producers somewhat more likely, Section 19 (b)'s requirement of substantial demonstrating what those taxes, if any, are and Section 4(e)'s placement of the burden of proof on the producers to provide that substantial evidence have not changed, as Judge Fahy correctly observed:

> Yet neither the need to [reconsider the tax issue] nor the likelihood of increased tax liability justifies an allowance which fails to be supported by substantial evidence, or which otherwise is unacceptable.[47]
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> Furthermore, as noted above, the Commission has made no provision for ascertaining what in reality occurs as to payment of or liability for income taxes, so as to be able to adjust the 43.5¢ component. There is no collection of evidence of the actual taxable income of even a sample of producers, or of the share to be allocated to each biennium of jurisdictional gas."[48]
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> Moreover, experiment may be utilized, but when the the task is to ascertain costs experiment is not a substitute for evidence, nor is ease of administration in the circumstances; the industry has access to the evidence, has the burden of proof, and of course is capable of making the evidence available for consideration by the Commission."[49]
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> • • • •
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> First, the burden has been and remains upon the producers to establish tax liability in actuality commensurate with the 43.5¢ per Mcf allowed to be collected. The Commission's position rests entirely upon

[47] *Id.* at 116-117.

[48] *Id.* at 119.

[49] *Id.* at 123.

the model without any contemplated Commission testing of it against actual data respecting taxes paid or for which liability accrues. The court's approach might result in a wholly unjustified tax component being charged because consumers do not have access to the evidence upon which income taxes are based, and cannot prove the component to be excessive.[50]

3. In upholding the Commission's use of only the minimal procedures of informal rulemaking set forth in Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, without any evidentiary hearing, the panel's opinion deprived consumers of any opportunity to cross-examine on the multitudinous complex and contested factual issues, such as productivity, drilling costs, the Commission's new tax model and the proffered industry AGA gas reserve data, contrary to both the clear language of the Natural Gas Act and the decisions of the appeals court in *Mobil Oil Corp.* v. *FPC*,[51] *City of Chicago* v. *FPC*,[52] *American Smelting & Refining Co.* v. *FPC*,[53] and *American Public Gas Association* v. *FPC*.[53]

Under informal rulemaking procedures, the producers file with their initial comments whatever data they wish the Commission to consider. Neither the Commission nor any of the other parties has any way of or opportunity for testing that data to see if it is valid or complete, nor are the other parties able to obtain additional data which may have been withheld. The consumers of gas are not permitted to cross-examine any of the data the producers submit, and thus the Commission blindly accepts the industry comments as the basis for the rates it sets. The

[50] *Id.* at 124.

[51] 483 F.2d 1238, 1256-62 (D.C. Cir. 1973).

[52] 458 F.2d 731, 743-44 (D.C. Cir. 1972).

[53] 494 F.2d 925, 933 (D.C. Cir.), *cert. denied sub nom.*, Southern California Gas Co. v. FPC, 419 U.S. 882 (1974).

consumer representatives have less opportunity to challenge the industry "Comments" upon which rates are based that take billions of dollars from them, than they would to defend against payment of a $25 traffic ticket.

As Judge Fahy's dissent clearly illustrates, the use of the "tolerate with a sigh" review standard, set forth by Judge Leventhal,[54] which unquestioningly accepts all hypothetical models and unverified data of the producers as true, instead of requiring that the producers provide the substantial evidence mandated by Section 19(b) of the Act, unlawfully shifts the Section 4(e) statutory burden of proof from the producers to the consumers. The producers have the tax information and the gas reserves data exclusively within their possession; thus, they can prove whether they do in fact pay x¢ per Mcf in taxes and whether their reserves and resulting productivity are at a certain level. On the other hand, it is not possible for the consumers, which are denied access to such information, to prove the negative. Because the use of informal rulemaking results in no evidence being elicited and tested through cross-examination and other accepted evidentiary procedures, the Commission cannot possibly support its rate orders with substantial evidence. This Court should not approve the Commission's actions by eschewing the substantial evidence review standard of Section 19(b) of the Natural Gas Act and by "abandon-[ing] their responsibility by acquiescing in a charade or a rubber stamping of non-regulation in agency trappings." [55]

The requirement of an evidentiary proceeding before rates are set by the Commission is mandated by the express terms of the Natural Gas Act. Under Sections

[54] Appendix A at 50, 62.

[55] Public Service Commission of the State of New York v. FPC, 167 U.S.App. D.C. 100, 511 F.2d 338, 354 (1975).

4(e) and 19(b) of the Act, 15 U.S.C. §§ 717c(e) and r(b), "just and reasonable" rates may be established only after "full hearings" and only if supported by "substantial evidence" in the record. The Natural Gas Act thus requires that some type of adversary proceeding be held whenever the setting of "just and reasonable" rates is at issue.[56] In addition, Section 15(b) of the Natural Gas Act, 15 U.S.C. § 717n(b) provides that "all hearings . . . shall be governed by rules of practice and procedure to be adopted by the Commission." And Section 1.20(g)(1) of the Commission's Rules of Practice and Procedure (Appendix H hereto) dealing with "Hearings" mandates that:

> Parties and staff counsel *shall have the right of* presentation of evidence, *cross-examination*, objection, motion, argument and appeal. [Emphasis supplied.] [57]

The key fact is that the substantive statute itself, in the instant case the Natural Gas Act, requires that "full hearings" be held at which "substantial evidence" in the record is obtained to support whatever ultimate action the Commission takes. Thus, it is not the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, which is controlling in this proceeding. That statute, as its title states, is purely procedural, merely setting forth the procedures to be followed by administrative agencies in ratemaking and other situations to the extent that the particular substantive statute governing the agency in question is silent as to the procedures to be followed and/or inconsistent with the APA's general procedures.

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[56] *See* Mobil Oil Corp. v. FPC, 157 U.S.App. D.C. 235, 483 F.2d 1238 (1973).

[57] It is an elementary and well established principle of administrative law that an agency's rules and regulations are as binding as the enabling act itself and must be adhered to by the agency in question. *E.g.*, Vitarelli v. Seaton, 359 U.S. 535, 539, 545 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 360 (1954); Teleprompter Cable Communications Corp. v. FCC, D.C. Cir. No. 75-1663 (Sept. 19, 1977), slip op. at 11; Gardner v. FCC, 530 F.2d 1086, 1089 (D.C. Cir. 1976); Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045, 1051 (D.C. Cir. 1975); Borough of Lansdale v. FPC, 494 F.2d 1104, 1113 (D.C. Cir. 1974).

Hence, in conflict with the instant opinion, the court of appeals in *Mobil*[58] found the "substantial evidence" standard of Section 19(b) of the Natural Gas Act as giving conclusive support to the position that in setting rates under the Natural Gas Act more was required than the informal rulemaking procedures of Section 553 of the APA, which might otherwise have applied if the substantive statute did not in fact include greater procedural requirements:

> The Natural Gas Act provides that "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 15 USC § 717r(b) (1971); The necessary implication is that if the findings are not supported by "substantial evidence" they will not be permitted to stand. *It is highly significant that this substantial evidence test is a part of the actual language of the Natural Gas Act. This indicates that Congress was particularly concerned with the degree of certainty required in establishing factual predicates in rate-making.*[59]
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> An indication of the nature of the procedural requirements imposed by the "substantial evidence" test may be gained from examining the use of that phrase in the Administrative Procedure Act. It provides that:
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> . . . The reviewing court shall—
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

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[58] Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973).

[59] 483 F.2d at 1257 n.68 (emphasis supplied).

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewable on the record of an agency hearing provided by statute. 5 USC § 706(2)(E) (1970).

This language indicates that Congress expected that the substantial evidence test would be used in conjunction with formal procedures under sections 556 and 557. Thus Congress, in using the phrase "substantial evidence" in another statute, undoubtedly thought that similar procedures would be used in creating this evidentiary record. This supports the conclusion that *the requirement of facts based on substantial evidence mandates greater procedural protection than those accorded under section 553 of the APA.*[60]

• • • •

Clearly the existence of the "substantial evidence" requirement in the Natural Gas Act demands that facts be determined and reviewed with a greater degree of certainty than is possible under the "informal" methods of section 553 of the APA.[61]

• • • •

Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting information is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate. A "whole record", as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It concludes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. *Thus, it is adversary procedural devices which permit testing and elucidation that raise information "substantial" enough to support rates.*[62]

[60] *Id.* at 1258 n.70 (emphasis supplied).

[61] *Id.* at 1259 (emphasis supplied).

In *United States* v. *Florida East Coast Railway Co.*,[63] this Court also held that the *substantive statute* and not the APA determined the nature of the procedures which must underly administrative action. In that case, this Court upheld rates set by the Interstate Commerce Commission ("ICC") under the informal rulemaking procedures of Section 553 of the APA. But it did so because the ICC Act only required that "the Commission shall give consideration to" various aspects of the railroad industry, and nowhere states that the ICC's rate decisions must be supported by "substantial evidence." Since the substantive statute in no way conflicted with Section 553, the latter's procedures were deemed sufficient.

In analyzing the *Florida East Coast Railway* decision, the court of appeals in *Mobil* observed:

> The Supreme Court's recent decision in United States v. Florida East Coast Railway [footnote omitted] in no way diminishes the validity of our conclusion that the "substantial evidence" test requires more exhaustive procedures than those in section 553 of the APA. As we have previously noted, in that case the Supreme Court upheld rates set by the ICC under informal section 553 procedures, but the ICC statute does not require that factual determinations be supported by substantial evidence.[64]
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> *Thus, neither the ICC statute nor the APA required that the substantial evidence test be used. In the case at bar the decisive distinguishing factor is that the*

[62] *Id.* at 1260 (emphasis supplied).

[63] 410 U.S. 224 (1973).

[64] 483 F.2d at 1260.

Natural Gas Act instead of either the Interstate Commerce Act or the APA provides the procedural standard.[65]

It is clear that the administrative segment of the *Second National Natural Gas* docket, which was conducted over a 19½ month period, would not have been delayed if the mandated hearing had been held. The original proceedings by the Commission in *Southern Louisiana I*, as well as the initial, first-round area rate cases in *Permian, Hugoton-Anadarko* and the other areas, required some time at the hearing level because new principles were being tested and regulatory treatment forged. The second-round area rate cases undertaken by the Commission required no such extensive time for the evidentiary hearings. In *Southern Louisiana II*, the hearings were quite short, lasting only 57 hearing days. The only delay experienced in *Southern Louisiana II* related to settlement negotiations, and not the utilization of adjudicatory procedures. All other times required to process *Southern Louisiana II* would be the same as involved in the Commission's present rulemaking approach.[66] Similarly, the adjudicatory hearing in *Permian II* was completed after just 5 days of hearings that included 1,271 pages of testimony and 36 exhibits by 33 witnesses. 50 F.P.C. at 394.

4. Finally, this Court should grant the writ to provide Petitioners with the full reach of judicial review on a question of exceptional importance which they will otherwise be deprived of by reason of the majority of the court of appeals recusing themselves from consideration of the case *en banc*. Rule 35(b) of the Federal Rules

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[65] *Id.* at 1261 n.83 (emphasis supplied).

[66] Southern Louisiana II Area Rate Proceeding, 46 F.P.C. 86, 101, 103, reh'g denied, 46 F.P.C. 633 (1971), *aff'd sub nom.*, Placid Oil Co. v. FPC, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974).

of Appellate Procedure gives a party the right to "suggest the appropriateness of a hearing or rehearing en banc." Rule 35(a) provides that rehearing will be "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Both of those criteria are present here yet the recusal of the circuit judges has made Rule 35 a meaningless right to Petitioners which is the anomalous result that occurs where, as here, all suggestions for rehearing *en banc* are automatically denied as a matter of law because a majority of the judges have recused themselves.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners request that this Honorable Court grant their petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Petition for Writ of Certiorari in accordance with Rules 31 and 33 of the Supreme Court of the United States.

November 15, 1977
Washington, D.C.

CHARLES F. WHEATLEY, JR.